IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-10-0161

BNSF RAILWAY COMPANY,
Appellant/Petitioner

v.

CHAD CRINGLE and MONTANA DEPARTMENT OF LABOR, HUMAN RIGHTS COMMISSION
Appellee/Respondents

Re: District Court Case No.: BDV-2009-1016

CHAD CRINGLE'S MOTION FOR RELIEF FROM DISTRICT COURT ORDER GRANTING MOTION TO STAY ENFORCEMENT OF JUDGMENT

Terry N. Trieweiler
TRIEWEILER LAW FIRM
309 Wisconsin Avenue
P.O. Box 5509
Whitefish, MT 59937
(406) 862-4597
(406) 862-4685 fax

Attorney for Appellee/Respondent, Chad Cringle

Jeff Hedger
Benjamin O. Rechtfertig
HEDGER FRIEND, P.L.L.C.
2800 Central Avenue, Suite C
Billings, MT 59102
(406) 896-4100
(406) 496-4119 fax

Attorneys for Appellant/Petitioner, BNSF Railway Company

Marieke Beck
Dept. of Labor & Industry
PO Box 1728
Helena, MT 59624-1728
(406) 444-2917
(406) 444-1394 fax

Attorneys for Appellee/Respondent, Dept. of Labor & Industry, Human Rights Division

Chad Cringle, the Appellee, moves this Court for relief from the district court's August 9, 2010, order reversing its previous two orders, approving the appellant's new *supersedeas* bond and granting a stay of execution of its judgment pending the final outcome of this appeal. This Motion is made pursuant to M.R.App.P. 22(2).

Counsel for the Appellant, BNSF Railway Company, has been contacted and objects to this Motion.

The affidavit of Counsel for the Appellee setting forth the procedural history in this case is attached hereto as Exh. 1. Copies of the district court's serial orders are attached hereto in chronological order as Exh. 2, 3, and 4.

PROCEDURAL BACKGROUND AND BASIS FOR RELIEF

On March 29, 2010, the district court entered its order enforcing the Department of Labor's final agency decision which awarded damages to Chad Cringle for BNSF's unlawful discrimination and enjoined it from similar future discrimination. For what it's worth, this is the third time that court has done so. Two previous orders enjoining its illegal activity have been affirmed by the Supreme Court and it continues to demonstrate its total contempt for the district court, the Supreme Court, the judicial process in general, and the people who's lives it's messing with by continuing to engage in its usual pattern of illegal conduct. For that reason, the Department entered a fourth order enjoining it from

doing so in the case of *Feit v. Burlington Northern Railroad*, H.R. Case No. 475-2010 (8/4/10).

In spite of this history, BNSF demonstrated its arrogance and contempt for the entire judicial process by, on April 15, 2010, moving the district court to put one more victim's life on hold by granting it a stay based on the promise that if its appeal is unsuccessful, payment will be guaranteed by another corporate bond.

Chad Cringle objected to the motion for a number of reasons, only one of which was the legal inadequacy of the *supersedeas* bond.

He also pointed out that:

1) If that court lacked jurisdiction over BNSF's petition in the first place, it didn't have jurisdiction to stay the effect of dismissing that petition; and

2) The facts in this case do not justify a stay because BNSF has demonstrated in past similar cases that it has no intention of ever appealing the merits of this court's or the Department of Labor's decisions to the Montana Supreme Court and that denial of payment to Chad Cringle of that money which is owed him so that the BNSF can further its national litigation strategy fashioned in Ft. Worth, Texas, is unreasonable and unfair.

Presumably, on those bases, BNSF's motions were denied by the district court on May 21, 2010. For that reason, and because Chad Cringle's financial situation is desperate, he sought, on May 25, 2010, to subpoena information from BNSF that would enable him to execute on his judgment.

In response, on June 8, 2010, BNSF moved for a protective order and to quash the subpoena based on its representation that it had asked the Montana Supreme Court for relief from the district court's May 21, 2010, order (Exh. 5, p. 3) and it assurance that,

> ". . . should BNSF's pending motion for relief from this court's May 21, 2010, order be denied, BNSF will not require plaintiff to execute on BNSF's assets to satisfy the judgment, but BNSF will pay the amounts due pursuant to the terms of the judgment. This nullifies the need for Cringle to depose Mr. Bartoskewitz or any other BNSF representative with regard to the topics identified . . . " (Exh. 5, p. 5)

Based on that disingenuous assurance, the district court quashed the subpoena on June 11, 2010. (Exh. 6) In its order, the court stated,

> "If the Supreme Court affirms this court's decision denying the stay, then BNSF's attorneys have assured this court that they will pay the judgment in question. This court has no reason to doubt that assurance and, since this matter will be quickly concluded, the court feels that the relief requested by BNSF is appropriate."

BNSF's argument to the Supreme Court repeated those arguments made to the district court, including its offer, which was previously made in this court, to secure a bond for a larger amount if directed to do so. (Exh. 7, p. 7)

After considering the briefs and arguments of the parties, the Supreme Court on June 22, 2010, ordered that the district court provide findings of fact and conclusions of law in support of its denial of the stay and *supersedeas* bond. The district court did so as recently as July 12, 2010, when it listed the following reasons for denying BNSF's stay, in addition to the fact that its proposed *supersedeas* bond had been inadequate:

1) The court's previous order quashing Cringle's subpoena was issued under the mistaken assumption that the matter would be quickly resolved. Because it hasn't been, that order should be vacated;

2) Cringle remains unemployed, and experiences severe financial distress, including the potential loss of his home;

3) Because the court presided over two previous appeals involving the same factual and legal issues and because of BNSF's failure to raise any substantive issues on appeal from those cases, the court was familiar with the likelihood of success on appeal in this case and considered further delay unreasonable; and,

4) Based upon its findings, the court concluded that all four factors which should be considered in granting a stay weigh against doing so. **None of those factors included the adequacy of the *supersedeas* bond.** (Exh. 4, pp. 8-9)

On August 3, 2010, the Supreme Court, after considering the district court's findings and conclusions and conferencing for a second time following the arguments presented in that forum, entered a unanimous order concluding that it agreed that BNSF had not demonstrated good cause for further delay. (Exh. 8, p. 2) Based on BNSF's representations to the district court, the court's unfounded acceptance of the BNSF's representations following repeated evidence that it cannot be trusted, and the Supreme Court's decision, that should have been the end of it. Chad Cringle should be paid. And the misery that has been added to his life

by BNSF's lawless and repetitious behavior should have at least been mitigated by enabling him to salvage a few possessions and live securely pending the final resolution of the appeal.

That didn't happen. Inexplicably, based on BNSF's belated willingness to post a *supersedeas* bond in a greater amount, which it had at all times been willing to do, the district court reversed itself, ignored all the previous reasons given for its two prior decisions as affirmed by the Supreme Court, and issued BNSF a permission slip to ignore its previous representations, the district court's reliance on those representations and the Supreme Court decision when on August 9, 2010, it gave BNSF what it always wanted.

AUTHORITIES & ARGUMENT

Chad Cringle is entitled to some closure here. He's entitled, when his economic survival is at issue, to rely on what he has been told repeatedly by the district court, the representations that have been made as part of this proceeding by BNSF, and the decision of the Supreme Court. He shouldn't have to cope with not only BNSF's blatant discrimination, but the uncertainty of a legal process which could change, without reason, at the whim of the district court on any given day. Those interests are well established in the law. They are called law of the case, collateral estoppel, *res judicata*, and judicial estoppel.

The Law of the Case doctrine "expresses the practice of courts generally to refuse to re-open that what has been decided. *Federated Mutual Ins. Co v.*

Anderson, 1999 MT 288, ¶59, 297 Mont. 33, 991 P.2d 915. citing *In re Marriage of Scott* (1997), 283 Mont. 169, 175, 939 P.2d 998, 1001-02. In other words, when the Supreme Court, deciding a case presented, states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. *Federated Mutual Ins.*, ¶60.

The doctrine of *res judicata* embodies the concept of "claim preclusion" and bars the re-litigation of claims a party has already had an opportunity to litigate. *Lorang v. Fortis Ins. Co.,* 2008 MT 252, ¶65, 345 Mont. 12, 192 P.3d 186 (citing *Baltrusch v. Baltrusch,* 2006 MT 51, ¶15, 331 Mont. 281, 130 P.3d 1267).

The doctrine of collateral estoppel, which embodies the concept of "issue preclusion" is a form of *res judicata* which bars a party from re-litigating an issue as opposed to an entire claim, where that issue has been litigated and determined. *Lorang*, (citing *Baltrusch,* ¶15).

The doctrines of *res judicata*, collateral estoppel,and the law of the case are all based on the judicial policy favoring a definite end to litigation. *Auto Parts of Bozeman v. Employment Rels. Div. Uninsured Employers' Fund,* 2001 MT 72, ¶27, 305 Mont. 40, 23 P.3d 193.

Finally, it is the rule in Montana "that parties are bound by and estopped to controvert admissions in their pleadings." *Roland v. Klies*, 223 Mont. 360, 368, 726 P.2d 310, 316 (1986). In *Bitterroot Int'l Sys, Ltd. v. W. Star Trucks, Inc.,* 2007

MT 48, 336 Mont. 145, 153 P.3d 627, the Supreme Court held that statements in motions and briefs are judicial admissions. 336 Mont. at 155-156. Certainly, then, promises made to and relied on by a court are binding upon a party. If not, then BNSF can add contempt of the court to contempt for the law as part of its repertoire which is judicially sanctioned.

BNSF's conduct is to be expected. Judicial condonation for that conduct is not.

CONCLUSION

On July 12, about a month ago, the district court held that BNSF was not entitled to a stay on appeal because it had previously delayed other identical cases without raising any substantive issue on appeal, the likelihood of success on appeal was practically nil, and the economic hardship of a stay on Chad Cringle was severe.

On August 3, less than two weeks ago, the Supreme Court agreed. Nothing has changed but for BNSF's submission of a larger *supersedeas* bond which it always argued was not necessary in the first place because of its immense wealth. Therefore, in reality, nothing at all has changed.

In spite of this long, protracted, labor intensive history, and without any other change in the circumstances, the district court inexplicably on August 9, reversed itself.

Not only is the court's latest order unfounded factually and legally, but it also completely ignores the finality to which all litigants are entitled once an issue has been finally resolved in the district court and on appeal to the Supreme Court.

The district court's order offends the interests protected by the law of the case doctrine, collateral estoppel, and *res judicata* and condones BNSF's misrepresentation that if its stay was denied by the Supreme Court, Chad Cringle would be paid. Therefore, the district court also ignored the principle of judicial estoppel.

For these reasons, pursuant to Rule 22 (2) M.R.App.P., the district court order dated August 9, 2010, should be reversed and set aside and the stay which has been granted should be lifted. The district court decision to stay execution on the judgment is completely independent and separate from any issue involving the adequacy of BNSF's *supersedeas* bond and should not have been decided based on BNSF's incremental efforts to provide an adequate *supersedeas* bond. Chad Cringle is entitled to the restoration of some consistency and reliability in this judicial process.

DATED this 16 day of August, 2010.

TRIEWEILER LAW FIRM

By: /s/ Terry Trieweiler
Terry N. Trieweiler

CERTIFICATE OF SERVICE

This is to certify that on the _____, August, 2010, a true and exact copy of the foregoing document was sent by facsimile and U.S. mail, first class, postage pre-paid, addressed to:

Jeff Hedger
Ben Rechtfertig
Attorneys at Law
2800 Central Avenue, Suite C
Billings, MT 59102
Facsimile (406) 896-4199

Marieke Beck
Department of Labor & Industry
Human Rights Commission
P.O. Box 1728
Helena, MT 59624-1728
Facsimile (406) 444-1394

By: Karen R. Weaver
Karen R. Weaver

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-10-0161

BNSF RAILWAY COMPANY,
Appellant/Petitioner

v.

CHAD CRINGLE and MONTANA DEPARTMENT OF LABOR, HUMAN RIGHTS COMMISSION
Appellee/Respondents

Re: District Court Case No.: BDV-2009-1016

AFFIDAVIT OF TERRY N. TRIEWEILER

Terry N. Trieweiler
TRIEWEILER LAW FIRM
309 Wisconsin Avenue
P.O. Box 5509
Whitefish, MT 59937
(406) 862-4597
(406) 862-4685 fax

Attorney for Appellee/Respondent, Chad Cringle

Jeff Hedger
Benjamin O. Rechtfertig
HEDGER FRIEND, P.L.L.C.
2800 Central Avenue, Suite C
Billings, MT 59102
(406) 896-4100
(406) 496-4119 fax

Attorneys for Appellant/Petitioner, BNSF Railway Company

Marieke Beck
Dept. of Labor & Industry
PO Box 1728
Helena, MT 59624-1728
(406) 444-2917
(406) 444-1394 fax

Attorneys for Appellee/Respondent, Dept. of Labor & Industry, Human Rights Division

STATE OF MONTANA)

: ss.

County of Flathead)

Terry N. Trieweiler, being first duly sworn upon oath, deposes and states:

1) On March 29, 2010, the district court entered its order enforcing the Department of Labor's final agency decision which awarded damages to Chad Cringle for BNSF's unlawful discrimination and enjoined it from similar future discrimination. This is the third time that court has done so. Two previous orders enjoining its illegal activity have been affirmed by the Supreme Court.

2) The Department entered a fourth order enjoining it from discriminating based upon obesity in the case of *Feit v. Burlington Northern Railroad*, H.R. Case No. 475-2010 (8/4/10)

3) In spite of this history, on April 15, 2010, BNSF moved the district court to grant a stay of its judgment based on the promise that if its appeal is unsuccessful, payment will be guaranteed by another corporate bond.

4) Chad Cringle objected to the motion for a number of reasons, only one of which was the legal inadequacy of the *supersedeas* bond.

He also pointed out that:

The facts in this case do not justify a stay because BNSF has demonstrated in past similar cases that it has no intention of ever appealing the merits of this court's or the Department of Labor's decisions to the Montana Supreme Court and

that denial of payment to Chad Cringle of that money which is owed him and that he desperately needs so that the BNSF can further its national litigation strategy fashioned in Ft. Worth, Texas, is unreasonable and unfair.

5) Presumably, on those bases, BNSF's motions were denied by the district court on May 21, 2010. For that reason, and because Chad Cringle's financial situation is desperate, he sought, on May 25, 2010, to subpoena information from BNSF that would enable him to execute on his judgment.

6) In response, BNSF moved for and received a protective order based on its assurance that if the Supreme Court refused to overturn the district court's denial of its stay, it would pay Chad Cringle the amount that is owed him.

7) After considering the briefs and arguments of the parties, the Supreme Court on June 22, 2010, ordered that the district court provide findings of fact and conclusions of law in support of its denial of the stay and *supersedeas* bond. The district court did so as recently as July 12, 2010, when it listed the following reasons for denying BNSF's stay, in addition to the fact that its proposed *supersedeas* bond had been inadequate:

1) The court's previous order quashing Cringle's subpoena was issued under the mistaken assumption that the matter would be quickly resolved. Because it hasn't been, that order should be vacated;

2) Cringle remains unemployed, and experiences severe financial distresss, including the potential loss of his home;

3) Because the court presided over two previous appeals involving the same factual and legal issues and because of BNSF's failure to raise any substantive issues on appeal from those cases, the court was familiar with the likelihood of success on appeal in this case and considered further delay unreasonable; and,

4) Based upon its findings, the court concluded that all four factors which should be considered in granting a stay weigh against doing so. **None of those factors included the adequacy of the *supersedeas* bond.**

8) On August 3, 2010, the Supreme Court, after considering the district court's findings and conclusions and conferencing for a second time following the arguments presented in that forum, entered a unanimous order concluding that it agreed that BNSF had not demonstrated good cause for further delay.

9) Inexplicably, based on BNSF's belated willingness to post a *supersedeas* bond in a greater amount, which it had at all times been willing to do, the district court reversed itself, ignored all the previous reasons given for its two prior decisions as affirmed by the Supreme Court, and issued BNSF a permission slip to ignore its previous representations, the district court's reliance on those representations and the Supreme Court decision when on August 9, 2010, it gave BNSF what it always wanted.

DATED the 16th day of August, 2010.

By: Terry Trieweiler
Terry N. Trieweiler

STATE OF MOTANA)
: ss.
County of Flathead)

Subscribed and sworn to before me this 16th day of August, 2010.

KAREN R. WEAVER
NOTARY PUBLIC for the
State of Montana
Residing at Whitefish, Montana
My Commission Expires
March 5, 2014

Karen R Weaver
Notary public for the State of Montana
Residing at Whitefish, MT
My Commission expires: March 5, 2014

CERTIFICATE OF SERVICE

This is to certify that on the 16th day of August, 2010, a true and exact copy of the foregoing document was sent by U.S. mail, first class, postage pre-paid, addressed to:

Jeff Hedger
Ben Rechfertig
Attorneys at Law
2800 Central Avenue, Suite C
Billings, MT 59102

Marieke Beck
Department of Labor & Industry
Human Rights Commission
P.O. Box 1728
Helena, MT 59624-1728

By: Karen R. Weaver
Karen R. Weaver